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Bruce Collins
Vice President and General Counsel

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September 19, 1996

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Notification of Permitted Ex Parte Presentation CS Docket No. 96-60

Pursuant to Section 1.1206(a)(2) of the FCC's Rules, the National Cable Satellite Corporation, d/b/a C-SPAN ("NCSC"), hereby notifies the Commission of the following permitted ex parte presentation.

On Wednesday, September 18, 1996, the undersigned, Bruce D. Collins, NCSC Corporate Vice President and General Counsel, met with Meredith J. Jones, Chief, and William H. Johnson, Deputy Chief, of the Cable Services Bureau to discuss NCSC's comments in the above-referenced docket and the attached memorandum, which should be included in the record of this proceeding.

If you need any further information, please contact the undersigned.

Sincerely,

Bruce D. Collins

cc: Meredith Jones
William H. Johnson

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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation -- Leased Commercial Access

September 1996

CS DOCKET No. 96-60

THE FCC HAS CLEAR LEGAL AUTHORITY TO INCLUDE IN ITS NEW LEASED COMMERCIAL ACCESS RULES A TRANSITION MECHANISM PROTECTING EXISTING PROGRAM NETWORKS AGAINST "BUMPING" BY ACCESS PROGRAMMERS

The FCC should incorporate a transition provision in its new leased commercial access rules that will allow cable operators that are at channel capacity to refrain from "bumping" from their channel line-ups cable programming networks that are being carried as of the new rules' effective date in order to accommodate access lessees. The Commission has clear legal authority to include such a provision in its new rules, and has exercised this discretion in analogous situations, as recently as this year in its open video systems order.

- **Most Cable Television Systems Have No Available Channel Capacity**

  It is well established that cable systems serving over two-thirds of the nation's cable subscribers are "at capacity."[1/] The must-carry regime adopted in the 1992 Cable Act has exacerbated prior capacity constraints. Cable operators have already been forced to delete high-quality program networks in order to accommodate marginal broadcast stations of lesser subscriber appeal.

- **Without Transitional Relief, Many Cable Operators Will Have To Remove High-Quality Program Services That Serve Important Audience Needs In Order To Accommodate Access Lessees**

  The FCC's "going forward" rate-setting methodology has allowed cable operators to add new program services to their regulated tiers that the Commission recognized would add programming diversity and greater subscriber selection. These new niche programming services, however, are the very channels that cable operators may be forced to displace in order to accommodate the programming of access lessees.

[1/] Turner Broadcasting System, Inc. v. FCC, 910 F.Supp. 734, 780 (D.D.C. 1995)(Williams, J., dissenting).

- **"Bumping" of Existing Program Services Would Cause Subscriber Confusion and Frustration**

  Cable subscribers will likely be faced with the loss of program services that may have served as the basis for their having ordered the individual tier or cable itself.

- **"Bumping" Would Damage Existing Cable Programming Networks**

  Cable networks have invested huge sums over the past several years in developing high quality programming meriting placement on coveted cable tiers. These networks pursued their business plans based on the FCC's prior interpretations of the Cable Act and reasonable predictions of resulting channel capacity. New leased access rules that provide no mechanism protecting existing program services would unfairly take away the hard-earned channels won by these services by their performance in the open market.

- **A "No-Bumping" Transition Rule Is Consistent With The 1984 Cable Act's Admonition That The FCC Not Adopt Leased Access Rules That Adversely Affect Cable Operators**

  The 1984 Cable Act stressed that the Commission must not adopt leased access rate rules and policies that would damage cable systems. Section 612 of the Act states that the FCC's leased access rates and policies must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[2/] Congress affirmed that the goals of leased access must be achieved "in a manner consistent with growth and development of cable systems."[3/]

  The legislative history of Section 612 explains that the FCC should not implement the Act's leased access provisions in a manner that would "adversely affect the cable operator's economic position."[4/] It cautioned that "[i]f not properly implemented, leased access requirements could adversely impact the economic viability of a cable system, thereby hurting the public."[5/]

[2/] 47 U.S.C. § 532(c)(1).

[3/] 47 U.S.C. § 532(a).

[4/] 1984 House Report at 50.

[5/] Id.

- **Congress Prescribed A Similar "No-Bumping" Transition Mechanism For Leased Access In The 1984 Cable Act**

  When Congress first adopted leased access requirements in the 1984 Cable Act, it protected against disruption of existing cable program services by prescribing that operators "[s]hall make channel capacity available for commercial use as such capacity becomes available."[6/] It was precisely the same types of problems that face cable operators today that prompted Congress to protect cable subscribers' program line-ups when it adopted the initial leased access requirements in 1984. Congress did not believe it was either equitable or sound public policy for a leased access programmer to "bump" an existing program service when it changed the rules of the programming marketplace. The FCC is today, in this docket, also considering a change in the dynamics of the programming marketplace. It should therefore provide a transitional scheme that comports with past Congressional actions in a similar context.

- **Congress Gave The FCC Broad Authority To Establish The "Terms And Conditions" For Leased Access**

  Congress has given the FCC broad authority to establish not only the maximum reasonable rate for leased access, but also the "reasonable terms and conditions" for the use of leased access channels.[7/] A requirement that leased access users await the expiration of existing programming agreements, or the activation or construction of additional channel capacity, is a reasonable condition of such use, since it carries out the Congressional mandate that the rules the FCC adopts protect cable operators against financial harm.

[6/] 1984 Cable Act, Section 612(b)(1)(E). See also House Report at 49 ("if a system subject to this section has its channel capacity being utilized to such an extent that if it were to come within full compliance with the required set aside it would necessitate removing cable services being provided to subscribers as of July 1, 1984, then the cable operator is not required to remove such services. However, a cable operator is required to partially comply to the extent the available channel capacity on the system permits, and must come into full compliance as channel capacity becomes "available.")

[7/] 47 U.S.C. § 532(c)(4)(A)(ii).

- **The FCC Has Also Adopted "No Bumping" Rules In More Recent Dockets To Protect Video Cable Subscribers Against Program Disruption**

Cable Channel Occupancy Rules

In 1993, in adopting the cable channel program occupancy limits under the 1992 Cable Act, the FCC adopted a "no-bumping" rule similar to the one suggested here, noting that given technological advances that would expand cable channel capacity, the transition period likely would be short-lived:

> "We recognize that grandfathering existing vertical programming relationships to some extent may protect established services and favor the largest and most vertically integrated cable operators. However, we believe that such considerations minimize the disruption to existing carriage agreements. Moreover, given the trend toward increased channel capacity as a result of improved cable technologies, it appears that no useful purpose would be served by requiring cable operators to drop existing services."[8/]

Open Video Systems

The Commission just this year adopted a similar approach to required expansion of channel capacity on open video systems in carrying out the 1996 Telecommunications Act. The FCC acknowledged that:

> "[r]equiring relinquishment of a provider's allotment of channels after it has made business plans and has begun providing service to customers is detrimental to the provider's business and disrupts service. Therefore, there is strong public interest in establishing some level of certainty in providers' expectations with respect to their ability to retain channel capacity once allocated, and in consumers' expectations of uninterrupted service."[9/]

[8/] Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565, 8604-05 (1993) (emphasis added).

[9/] Report and Order and Notice of Proposed Rulemaking, Implementation of § 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46 (rel. March 11, 1996) (emphasis added). See also OVS Second Report and Order, FCC 96-249, (rel. June 3, 1996)(justifying its adopting of a "no-bumping" transition mechanism, the FCC (continued...)

- **A "No-Bumping" Transition Rule Is Fully Consistent with the FCC's General Rulemaking Authority Under Section 4(i) Of The Communications Act, Which The Commission Has Relied Upon In Analogous Situations**

  Implementing a "no-bumping" transition for the new leased commercial access regime would be fully consistent with the Commission's rulemaking authority. Section 4(i) of the Communications Act of 1934 gives the FCC authority to promulgate transition rules necessary to meet its objectives. It states that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders...as may be necessary in the execution of its functions."[10/]

  The Commission has recently relied upon Section 4(i) of the Communications Act in analogous instances to support transitional rules:

  Interconnection

  In its recent First Report and Order on local exchange interconnection, the FCC relied on Section 4(i) to implement a transitional measure for the collection of local exchange carrier ("LEC") telephone access line charges. The Commission ruled that "[g]iven the extraordinary upheaval in the [telephone] industry's structure set in motion by the 1996 Act,... we believe that a temporary mechanism is necessary in order to ensure that the policy goals underlying the access charge system and the Communications Act itself are not undermined."[11/] The FCC noted that courts have held the FCC's general rulemaking authority to be "expansive," not limited.[12/]

  Open Video Systems

  The FCC recently relied upon Section 4(i) in permitting non-LECs to become OVS operators.[13/] In so doing, the Commission noted that it "may properly take action

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[9/](...continued)
stated: "We believe that this approach will provide stability, certainty and flexibility to the platform. For subscribers, this approach will mean less confusion and less disruption of their channel line-ups, for video programming providers, this approach will provide additional incentive and ability to invest in and market their services...") (¶ 55).

[10/] 47 U.S.C. § 154(i).

[11/] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (rel. Aug. 8, 1996), ¶ 725.

[12/] Id. at ¶ 96.

[13/] OVS Second Report and Order at ¶ 20.

under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions."[14/]

The FCC also observed in the OVS order that "Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority. In these cases, the courts found that the Commission's regulations were not inconsistent with the Act because they did not contravene an express prohibition or requirement of the Act, and were 'necessary and proper' for the execution of the agency's enumerated powers."[15/]

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[14/] Id. at ¶ 20.

[15/] Id. at ¶ 21, citing New England Telephone & Telegraph Co. v. FCC, 826 F.2d 1101, 1107-09 (D.C. Cir. 1987), North American Telecomm. Ass'n v. FCC, 722 F.2d 1292, 1292-93 (7th Cir. 1985), Lincoln Telephone Co. v. FCC, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981), and Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975).

PROPOSED TRANSITIONAL "NO-BUMPING" RULE

A cable television system operator shall not be required to remove any service actually being provided on the effective date of these rules in order to comply with the requirements specified herein, but shall make channel capacity available to access lessees as new capacity becomes available until such time as the cable operator has leased its full complement of leased access capacity designated pursuant to 47 U.S.C. 532.

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